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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. ARTHUR RAY SWOPE, Defendant and Appellant.	F074004 (Kern Super. Ct. No. BF159035A) **OPINION**

APPEAL from a judgment of the Superior Court of Kern County. John W. Lua, Judge.

Ross Thomas, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Peter H. Smith and Daniel B. Bernstein, Deputy Attorneys General, for Plaintiff and Respondent.

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INTRODUCTION

Appellant/defendant Arthur Ray Swope was charged and convicted of two counts of robbery (Pen. Code, § 212.5, subd. (c))[1] and misdemeanor resisting arrest (§ 148, subd. (a)(1)). He was sentenced to the second strike term of 21 years in prison.

On appeal, defendant argues the court abused its discretion when it denied his pretrial motions to dismiss the venire and for a mistrial. Defendant made the motions during voir dire after a prospective juror, who was a correctional officer, said he recognized defendant because he had previously been in custody. The court denied the defense motions. Thereafter, the court, defense counsel, and the prosecutor extensively questioned the prospective jurors about whether hearing that information would affect their deliberations. Defense counsel excused several individuals from the venire but kept the correctional officer on the jury and did not use all of his peremptory challenges.

Defendant asserts the court's denial of his motions to dismiss the venire and for a mistrial violated his right to due process because the correctional officer's statements during voir dire made it impossible to select a fair and impartial jury.

We find that the court did not abuse its discretion when it denied defendant's motions. We affirm defendant's convictions but remand the matter for resentencing, as agreed to by the parties.

PART I

TRIAL EVIDENCE

On January 16, 2015, Sylvia Campos (Campos) was on duty at the Target store on Stockdale Highway in Bakersfield. Campos was the store's executive team leader of asset protection. She was in her office and monitoring the store's surveillance cameras with Rose Datugan (Datugan), a member of the store's asset protection team.

[1] All further statutory citations are to the Penal Code unless otherwise indicated.

Campos observed a man, later identified as defendant, pushing a cart through the store. He was wearing dark sunglasses and a hat that was pulled down on this face. Campos testified the hat and sunglasses drew her attention, and she went to the sales floor to follow him. Datugan remained in the office to watch him on the cameras.

Campos followed defendant to the electronics department and noticed there was some merchandise in the shopping cart. Datugan advised Campos that the store's video surveillance camera showed that defendant selected three pairs of headphones and put them into his cart. Defendant went to the domestic department and Campos followed him. Campos saw defendant gather several items from his cart and place them under his sweater and in his waistline.

Campos testified that defendant left the cart and walked toward the exit. Campos advised Datugan that they were going to apprehend him. Defendant walked past the cash registers and did not attempt to pay for the merchandise that he had concealed.

Campos testified that the store had two sets of exit doors, connected by a vestibule area. Defendant walked through the first set of doors. Campos and Datugan approached defendant in the vestibule area and stood on either side of him.

Campos identified herself and told defendant she wanted to talk to him about the unpaid merchandise. Campos asked defendant to come back in the store. Defendant repeatedly said, "[N]o," walked past them, and quickened his pace.

Defendant went through the second set of doors, walked out of the store, and headed toward the parking lot. Campos grabbed one of defendant's arms and Datugan grabbed the other, and they attempted to place defendant in handcuffs. Campos tried to pull defendant toward the store. Defendant pulled away from them, toward the parking lot.

Campos testified defendant was aggressive and had an angry look on his face. Datugan described defendant as bigger than both of them. Defendant swung his arms and

broke free from their grips on his arms and reached into his pocket. Campos believed that defendant pulled out a pocket knife.

Campos testified that defendant reached into his waist and removed a small box that was wrapped in duct tape. Campos testified that defendant pointed the knife at them and tried to flick open the blade, but it did not open. Defendant seemed nervous and appeared to be shaking. Datugan testified she did not see a knife.

At this point, Campos shouted at Datugan to "disengage" from defendant because she believed he intended to hurt them with the knife. They both moved away from him. Defendant walked to the parking lot with the small box and the concealed stolen merchandise.

Defendant had dropped his cell phone when he was trying to break free. As he walked away, Campos picked up the cell phone, waved it at defendant, and told him that she planned to give it to the police.

Campos testified that defendant turned around, walked back, and spoke to Campos outside the store. Campos did not see the knife. Defendant's demeanor changed, and he acted sincere and apologetic. Defendant said he would give back the merchandise. Campos asked defendant to return into the store. Defendant refused. Instead, he opened the box, removed the stolen headphones, and dropped them on the ground.

Campos retrieved the merchandise but kept defendant's cell phone. Campos walked back inside the store. Defendant ran into the parking lot.

Campos testified that defendant had placed the stolen merchandise in a small, homemade box that was wrapped in gray duct tape. Campos explained that based on her experience, duct tape prevents the store theft alarms from being activated.

Campos examined defendant's phone and called a contact identified as "Mom." Based on that call, she learned defendant's name and reported him to the police. She later identified defendant from a photographic lineup.

Defendant's testimony

At trial, defendant testified on both direct and cross-examination that he had prior convictions for petty theft with a prior conviction in 1999 and 2008 and attempted second degree commercial burglary in 2013.

Defendant testified that he entered the store with the intent to steal merchandise. He had a box that was put together with duct tape. He stole packages of headphones from the store, put them in the box, and concealed the box in his pants. He intended to return the items to the store at a later time for a cash refund.

Defendant testified that the employees confronted and touched him. He pulled away and resisted but insisted that he did not have a knife. He panicked because he was afraid of being arrested. He reached for the box that was concealed in his waistline and tried to get rid of the merchandise. Defendant dropped his wallet, and one employee held it up and said he was going to be arrested.

Defendant testified that he figured he would "diffuse" the situation by returning the merchandise. "[I]n the past, there's been a few times when I've been arrested, and if I drop the stuff, they just, like, leave me alone and they don't pursue it no longer. They are happy just to get their stuff back, and I get to go home."

Defendant gave back the property and headed to the parking lot. He did not realize that he dropped his cell phone until he got back into his car.

Defendant admitted that while he was in custody, he called his mother from the jail and knew the call would be recorded. He told his mother that he did not commit the offense. Defendant testified he lied to his mother because he knew the truth would hurt her.[2]

[2] Defendant further testified that "[t]o know that I am looking at life in prison would kill my mother." The court granted the prosecutor's motion to strike this statement and ordered the jury to disregard it.

Conviction and sentence

Defendant was charged with counts 1 and 2, robberies of Campos and Datugan (§ 212.5, subd. (c)), and that he personally used a deadly weapon, a knife, in the commission of the offenses (§ 12022, subd. (b)(1); and count 3, misdemeanor resisting arrest (§ 148, subd. (a)(1)).

As we will discuss in part II of the Discussion, *post*, the information alleged defendant had three prior strike convictions, three prior serious felony enhancements, and six prior prison term enhancements.

After a jury trial, defendant was found guilty of counts 1 and 2. The jury found the deadly weapon enhancement not true. Defendant pleaded no contest to misdemeanor count 3. The court found all the prior conviction allegations true. Defendant was sentenced to the second strike term of 21 years.

PART II

PRETRIAL MOTIONS IN LIMINE

Defendant's primary issue is that the court abused its discretion when it denied his motion to dismiss the venire and for a mistrial. As we will explain, Juror No. 4004948, who was a correctional officer, said during voir dire that defendant looked familiar because he had previously been in custody at Wasco.

In order to address defendant's contentions, we will begin with defendant's pretrial motions in limine, and the court's rulings as to whether defendant would be impeached with any of his prior convictions if he decided to testify.

On April 5, 6, and 7, 2016, the court began defendant's trial with consideration of the parties' motions in limine.

The information alleged defendant had three prior strike convictions, three prior serious felony enhancements, and six prior prison term enhancements. The court granted defendant's motion to bifurcate the prior conviction allegations and redact the information to remove any references to prior convictions.

Just before jury selection began, the court addressed the People's motion in limine No. 10: "If defendant so testifies, People seek leave of the Court to impeach the defendant with the following felony convictions under Evidence Code section 788." The motion listed six prior theft-related convictions from 1989 to 2013. The prosecutor argued the prior convictions were offenses of moral turpitude and impeachment was proper.

Defense counsel replied there was "a chance that [defendant] will actually or could take the stand in this case." Counsel objected to impeachment with any of the prior theft-related convictions.

The court stated that the People sought to impeach defendant's credibility with the six prior theft-related convictions that involved moral turpitude "only if he chooses to testify," and those offenses were "to a certain extent similar" to the charged offenses in this case. The court also noted the gaps in defendant's criminal history were consistent with serving time in prison.

The court found the prior offenses from 1989 were too remote for impeachment. Defense counsel advised the court that the 1989 offenses had been reduced to misdemeanors.

The court found that the 1999 conviction for theft and the 2008 and 2013 convictions for petty theft with a prior were not remote in time, and defendant could be impeached with those convictions "if he chooses to testify."

The court initially ordered the prosecutor to sanitize the convictions used to impeachment, and only state that they were offenses of moral turpitude since the prior convictions were similar to the charged offenses.

The court later asked defense counsel if he objected to sanitizing the prior convictions in case the jury believed the offenses were more serious than they were. There was also discussion between the parties as to whether any of the felony offenses had been reduced to misdemeanors. Defense counsel asked the court not to sanitize the

offenses. The court ordered the prosecutor that "if the defendant testifies and you do impeach him," that he refer to the prior convictions as theft-related offenses and not felony convictions.

PART III

JURY SELECTION

We now turn to voir dire and the statements by Juror No. 4004948 that resulted in defendant's motions to dismiss the venire and for a mistrial

A. Initial Statements by Juror No. 4004948

On April 7, 2016, after it ruled on the parties' motions in limine, the court began jury selection.

During voir dire, the court advised the prospective jurors that it would ask them several questions, including whether they knew anyone in law enforcement or the legal profession, and if they recognized anyone from the witness list, the attorneys in the courtroom, or the defendant himself.

When the court initially questioned Juror No. 4004948 (identified in the record as a man), he said that he worked for the Department of Corrections. In response to the court's questions, he said that he would be able to set aside his training and experience, he would decide the case based on the evidence that was presented, and he would not feel pressured to vote a certain way because of his job. The following exchange occurred:

> "[JUROR No. 4004948]: He looks familiar. Been to Wasco before, to the best of my ability. I think he was my porter at one time."

The court said that it would talk to Juror No. 4004948 about that in private.

Shortly after this exchange, it was defense counsel's turn to question the group of prospective jurors that included Juror No. 4004948. Counsel asked for a sidebar conference.

B. The Court's Initial Denial of Defendant's Motion to Dismiss the Venire

In response to defense counsel's request, the court conducted a chambers conference with the attorneys outside the jury's presence. It was not reported.

The court later placed the discussion on the record and stated that defense counsel had asked the court to immediately dismiss the entire jury panel as a result of Juror No. 4004948's statements about recognizing defendant. The court stated it had denied the motion.

After it denied the motion in chambers, the court and the parties returned to the courtroom and continued voir dire.

C. Continued Voir Dire of Juror No. 4004948

When voir dire resumed, defense counsel questioned Juror No. 4004948, in the presence of the entire panel:

> "[DEFENSE COUNSEL]: Well, now that we know you know [defendant], [Juror No. 4004948], and why you know [defendant]—
>
> "[JUROR No. 4004948]: Looked familiar. I wasn't too sure.
>
> "[DEFENSE COUNSEL]: Okay. The question I have for you, what about a person who obviously committed some wrongs before? Will he automatically be guilty of what they are charged with today? That's going to be an honest question. Some people think you never change.
>
> "[JUROR No. 4004948]: I mean, if he's got priors – obviously know he does. Take age into effect, if he is a certain age. Is he equipped? Probably not.
>
> "THE COURT: I can't hear you, [Juror No. 4004948].
>
> "[DEFENSE COUNSEL]: You might want to try that again. [¶] What do you think?
>
> "[JUROR No. 4004948]: I take into factors – okay? – since I've known him before, seen him, he's come to my building before, I look at his age now – okay? – is he still going to continue doing this? Probably so. I take that into effect and think about it.

Defense counsel asked Juror No. 4004948 if he would automatically believe defendant was lying if he testified, based on his knowledge of defendant's criminal past. Juror No. 4004948 said no. When asked whether he would hold the People to the burden of beyond a reasonable doubt, even though he knew about defendant's criminal past, Juror No. 4004948 agreed the People had to prove the case beyond a reasonable doubt.

In response to the prosecutor's questions, Juror No. 4004948 said he would follow the law as instructed by the court, even if he disagreed with it. Juror No. 4004948 said he would follow any instruction about how to evaluate a witness's credibility if he had a criminal history, and he would decide the case based entirely on the trial evidence.

D. Private Questioning of Juror No. 4004948

At his request, Juror No. 4004948 was later questioned privately by the court and the attorneys about an unrelated matter, outside the presence of the panel.

During the course of the private questioning, defense counsel asked Juror No. 4004948 if he had formed any impressions of defendant from their past association. Juror No. 4004948 replied: "I have nothing against him. From what I remember, he was a good porter…. [¶] I mean, he worked with me for a little bit, if I remember correctly." Defense counsel said he just wanted to make sure "there wasn't something really negative there that I should know about." Juror No. 4004948 said no.

The prosecutor asked Juror No. 4004948 to explain what defendant's duties had been as a porter. Juror No. 4004948 said the porters were picked "pretty much by appearance," and if "they've got a good head on their shoulders. We can ask them to do tasks for us, clean up after – like, if we do chow in the building, just like a trustee."

Juror No. 4004948 was not challenged and was eventually sworn as a juror.

E. Statements by Prospective Jurors Who Were Seated on the Jury

As voir dire continued, both defense counsel and the prosecutor questioned other prospective jurors who were present when Juror No. 4004948 said that he recognized defendant from his time in custody. The prospective jurors were asked whether they

could still be fair and impartial after hearing about defendant's past. The court did not place any limits on the attorneys' questions to the prospective jurors.

The following prospective jurors responded to these questions as set forth below. They were subsequently seated on the jury and not challenged by either the prosecutor or defense counsel.

1. Juror No. 3753232

Juror No. 3753232 said, "We all have pasts," and "I think everybody has the right to just be judged on the current issue, not the past." This juror would not find someone guilty of a crime that person did not commit because the person had a past. This juror also said the prosecution's burden of proof should not be reduced because of defendant's criminal record.

Juror No. 3753232 was not challenged.

2. Juror No. 3617777

Juror No. 3617777 said, "I do think people change. So just depending on their current status." This juror said that if defendant testified, the juror would not automatically believe he was lying, would have to hear all the facts, and could be fair and impartial. If the juror learned about a witness's prior criminal history, the juror would make her own determination about the witness's credibility.

Juror No. 361777 was not challenged.

3. Juror No. 3766691

Juror No. 3766691 could be fair and impartial, and said that defendant's criminal past would not influence the determination as to whether he had the requisite criminal intent. When asked if the juror would reject defendant's testimony based on his criminal past, the juror answered, "Absolutely not."

Juror No. 3766691 was not challenged.

4. Juror No. 4040419

Juror No. 4040419 was asked if the juror would be affected by learning that defendant had a criminal past, and replied, "Not at all."

Juror No. 4040419 was not challenged.

F. Statements by Prospective Jurors Who Were Not Seated

The following prospective jurors gave these responses to questions about defendant's past in the presence of the venire, except as noted; these individuals were not seated on the jury.

1. Prospective Juror O.N.

Prospective Juror O.N. said he would not consider defendant's past as a current issue, he could be fair and impartial in this case, and would require the People to prove the case beyond a reasonable doubt. He requested to speak to the court in private, outside the presence of the rest of the panel, about prior interactions with law enforcement.

The prosecutor used a peremptory challenge to excuse Prospective Juror O.N.

2. Prospective Juror W.F.

Prospective Juror W.F. was a correctional officer and said, "I am not going to say it's impossible for people to change because I've seen people change. [¶] However, in my experience, those are few and far between." When asked if he could still be impartial, he said: "[Defendant's] criminal past should not have anything to do with the charges that are currently against him. The only time they would be brought into effect is in the case he is found guilty, his prior past would add time, or should."

Defense counsel used a peremptory challenge to excuse Prospective Juror W.F.[3]

[3] The record infers that the court denied defense counsel's motion to excuse this prospective juror for cause, and that counsel then used a peremptory challenge.

3. Prospective Juror S.S.

Prospective Juror S.S. said, "I think knowing that [defendant] has a criminal past speaks to his character. I also think that you cannot teach an old dog new tricks. And he's – no offense – an old dog. That being said, I would do my best to judge him fairly, but I can't honestly say that that hasn't entered my mind now that I know that." She later stated, "I think the seed of doubt has been planted, but I do believe in everyone getting a fair trial, but I can't honestly say that that's not going to be in the back of my mind. [¶] He might be a career criminal. [¶] So that's something I have to take into consideration. I would have to listen to the evidence. [¶] I don't think that I am the person that you want on your jury, although I was looking forward to being on a jury because I have never actually been on one…." She would not automatically reject what defendant had to say, but she would "question it." She thought that she could be fair and would require the People to prove the case beyond a reasonable doubt, "but I can't sit here and tell you that I am not in judgment of him."

The court excused Prospective Juror S.S. for cause.

4. Prospective Juror S.

Prospective Juror S. worked for the probation department and made determinations if people had violated probation. She said she could set aside her work experiences if she learned the defendant had a criminal past.

Defense counsel used a peremptory challenge to excuse Prospective Juror S.

5. Prospective Juror C.

The court and attorneys privately questioned Prospective Juror C., who said he had been robbed several times. Outside the presence of the venire, Prospective Juror C. said that he was upset the people who robbed him had been let go, he would try to follow the law, but he would have a problem if he knew a witness had a criminal past.

The court excused Prospective Juror C. for cause.

6. Prospective Juror P.

Prospective Juror P. was also privately questioned outside the venire's presence. He said his elderly grandfather had been assaulted with a knife many years ago, but it still made him upset to think about it. He could not promise to be impartial if a weapon had been used in this case.

The court excused Prospective Juror P. for cause.

G. The Court's Discussion About Chambers Conference

As explained above, the court conducted an unreported chambers conference immediately after Juror No. 4004948 initially said he recognized defendant from his time in custody. At that time, the court denied defendant's motion to dismiss the venire and voir dire continued.

In the midst of voir dire, the court held a hearing outside the presence of the prospective jurors. The court placed on the record what happened during that unreported conference about Juror No. 4004948's statements.

The court stated that during the chambers conference, defense counsel had moved "for a poisoned panel" because Juror No. 4004948 (also identified as Juror No. 15) said defendant looked familiar. The court said it had denied that request and explained its reasons.

> "The Court, based on its own observations in court when [the juror] made that representation, informed counsel that it would deny that request based on the defendant's conduct at that time and understands that the defendant cannot, by way of his own actions, cause a mistrial, nor would the Court find good cause based on the defendant's conduct alone.
>
> "Specifically at 3:38 this afternoon, when the Court was asking those that just joined the panel in the courtroom proper questions, one arose as to [Juror No. 4004948] regarding whether he had any answers responsive to the questions previously asked. He did inform the Court, which made greater sense later, that he recognized or he believed he recognized the defendant. *Specifically he said, after acknowledging a wave from the*

defendant, that he looks familiar and that he would lead – or he thought the defendant was in his port at one time.

"The Court's observations when having an opportunity to listen to the answers responsive to the questions by the prospective jurors is in a position to see not only the jurors' expressions, reactions, and faces, but also other participants in the courtroom. And when [Juror No. 4004948] was speaking, the Court had a clear vantage point of not only [Juror No. 4004948], himself, but of counsel and the defendant. *And the defendant appeared, in the Court's view, to make a furtive motion toward [Juror No. 4004948], and once that was done, the Court look at [Juror No. 4004948], who appeared to have, at least on his expression, a look of recognition*, and then he stated that the defendant looked familiar to him without going into greater detail than what was previously expressed on the record.

"At sidebar, the issue was broached, and the Court, as stated previously, informed counsel that it would not grant a poisoned panel motion for the reasons just stated on the record. [Defense counsel] needed to know the Court's position in that regard to determine to what extent, if anything, he broached the subject now that [Juror No. 4004948] unwittingly introduced, after which [defense counsel] went on to question the supplemental group regarding areas involving a person's past and whether that would have any effect on their ability to serve as jurors in this case.

"As to the motion for a poisoned panel, the Court has set the record regarding what occurred at sidebar, but there has not been a formal motion yet." (Italics added.)

Defense counsel said the court's summary of the chambers conference was accurate, and that he had moved to dismiss the venire and for a new panel of prospective jurors. Defense counsel again moved to dismiss the venire and for a mistrial, and argued:

"Information that they are not supposed to know, at least at this point, and perhaps never will know, is information that [Juror No. 4004948] is aware of and unfortunately slipped to the entire jury.

"When [Juror No. 4004948] made the comment, 'Yeah, I recognize him from Wasco,' and then when I believe [defendant], when you talk about a furtive moment, waved at him and they both recognized one another and giggled a little bit, it appeared, well, it became obvious that they were talking about his time that he had served in prison and he had

watched over him and I think he even mentioned something about, 'I remember him,' seeing him in a certain yard.

"So at that point, that's when I asked for the sidebar, to go in the back to see if a motion would be granted. Your Honor told me that the motion would be denied.

"So I did everything I can to try to see if I can be as honest as possible with the jury and then now start talking about his criminal past and see how that's going to affect their decision or not.

"I think that sums it up.

"I would say that that information should never have came out. It should have been done in private. It is not the fault of the Court, nor do I find any fault in [the prosecutor], myself, anybody. It just happened to be [Juror No. 4004948] blurted something out real quick and there was nothing anybody can do to stop it. However, it was information that has been bifurcated and that the jury was not to learn. The only time they would learn something similar in that nature—which I believe the crimes they are going to hear about are misdemeanors. I am not sure. *But the only way they would hear about it is if [defendant] actually took the stand. There were three different incidents where his criminal past was going to come in. That would only be used against his credibility. But that would only be if [defendant] took the stand. We were now forced at this point to basically reveal things that we did not have to reveal had [Juror No. 4004948] not given voluntarily the information that was given*.

"So that was my motion, and I am making that motion right now." (Italics added.)

The prosecutor said that he agreed with the court's reasons to deny defendant's motion. The prosecutor said:

"*[W]hen [Juror No. 4004948] first made mention that he believed he recognized the defendant, that it was shortly right thereafter that I believe the defendant – the furtive gesture was waving towards [Juror No. 4004948]. That prompted [Juror No. 4004948] to give the further information*." (Italics added.)

The court denied defendant's motions to dismiss the venire and for a new panel, and for a mistrial.

As set forth above, the court and the attorneys questioned the prospective jurors about whether their knowledge of defendant's past would affect their deliberations in this case. The court excused some people for cause, and both the prosecutor and defense counsel used peremptory challenges. Juror No. 4004948 was not challenged and was sworn as a juror.

At the end of jury selection, defense counsel noted that he had requested to remove a person for cause, the court had denied the motion, and instead defense counsel used a peremptory challenge to excuse that person. Counsel added that "it actually seems that I didn't use all of my peremptory challenges…."

H. Sentencing Hearing

Defendant was convicted on April 14, 2016. The court found the prior conviction allegations true on April 15, 2016, and set the sentencing hearing for May 19, 2016. The court subsequently granted defense counsel's motions to continue the sentencing hearing because counsel was preparing a request to dismiss the prior strike convictions and a motion for new trial based on the court's refusal to dismiss the venire because of Juror No. 4004948's statements.

On June 30, 2016, the court convened the continued sentencing hearing.[4] Defense counsel had filed the request to dismiss the prior strike convictions. However, counsel asked the court to continue the hearing. Counsel said he had prepared a motion for new trial based on the court's denial of his pretrial motion to dismiss the venire, but he needed time to file, serve, and notice the motion. Counsel offered to present copies to the court and the prosecutor, so the matter could be heard the following day. The prosecutor opposed another continuance because counsel had sufficient time since the verdict to prepare the motion.

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[4] As we will explain in part II of the Discussion, *post*, the court subsequently recalled and resentenced defendant; it did not address defendant's voir dire motions at the second sentencing hearing.

The court denied defense counsel's motion to continue to file a motion for new trial, and found counsel had enough time to prepare the motion after the verdict.

While the court denied counsel's motion for a continuance, it made additional findings about why it had denied defendant's pretrial motion to dismiss the venire and for a mistrial:

> "The court made findings at that time denying the motion for a mistrial and making that representation in chambers with reasons why, after which defense counsel did come out and conducted his voir dire in a manner that he deemed necessary and appropriate by asking individuals, if they learned that his client had been convicted previously, would they automatically disbelieve anything that he had to say, wherein the responses were in the negative, in other words, they would not use that against him automatically but would consider it ostensibly as a factor as they would consider it against any witness.
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> "The Court was confident at that exchange that the jurors that were empaneled could give both sides a fair trial and were at that time at least on notice that the defendant might have a colorful past that may be introduced for the limited purpose of determining credibility.
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> "After the motion for a mistrial was made in chamber, we did memorialize that chambers conference on the record, and the Court articulated at that time the reasons why the mistrial motion was denied. There was a formal motion made and a formal denial made by the Court with expressed reasons articulating why it was denied. Those circumstances have already been memorialized in the record and thereafter preserved for purposes of any appealable issues that might arise on appeal.
>
> "It was represented on or about May 19 [the first scheduled sentencing hearing] that that was one circumstance under which a motion for a new trial should be entertained. And finding that that issue has already been addressed to the Court both off and on the record, the Court is satisfied that the record that has been generated certainly can be reviewed by an independent tribunal for any independent determination of a motion for a new trial."

The court then conducted the sentencing hearing.

DISCUSSION

I. The Court Did Not Abuse its Discretion When it Denied Defendant's Motions During Voir Dire

Defendant contends his convictions must be reversed because the court abused its discretion when it denied his motions to dismiss the venire and for a mistrial. Defendant argues that Juror No. 4004948's statements during voir dire, that he recognized defendant because he had been in custody at Wasco, made it impossible to pick a fair and impartial jury.

A. Voir dire

A criminal defendant has the constitutional right to a determination of guilt or innocence by a fair and impartial jury. (U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, § 16; *People v. Wheeler* (1978) 22 Cal.3d 258, 265; *People v. Martinez* (1991) 228 Cal.App.3d 1456, 1459–1460 (*Martinez*).) " ' "The right to a fair and impartial jury is one of the most sacred and important of the guaranties of the constitution. Where it has been infringed, no inquiry as to the sufficiency of the evidence to show guilt is indulged and a conviction by a jury so selected must be set aside." [Citations.]' [Citation.]" (*Martinez, supra,* 228 Cal.App.3d at p. 1460.)

The discharge of an "entire venire is a remedy that should be reserved for the most serious occasions of demonstrated bias or prejudice, where interrogation and removal of the offending venirepersons would be insufficient protection for the defendant." (*People v. Medina* (1990) 51 Cal.3d 870, 889 (*Medina*).) That "drastic remedy" is not "appropriate as a matter of course merely because a few prospective jurors have made inflammatory remarks." (*Ibid.*)

"A trial court should grant a mistrial only when a party's chances of receiving a fair trial have been irreparably damaged, and we use the deferential abuse of discretion standard to review a trial court ruling denying a mistrial. [Citation.]" (*People v. Bolden* (2002) 29 Cal.4th 515, 555.) Likewise, "the trial court possesses broad discretion to

determine whether or not possible bias or prejudice against the defendant has contaminated the entire venire to such an extreme that its discharge is required." (*Medina, supra*, 51 Cal.3d at p. 889.) As this deferential review standard implicitly recognizes, "the trial judge is in the best position to assess the state of mind of a juror or potential juror on voir dire examination. [Citations.]" (*People v. McPeters* (1992) 2 Cal.4th 1148, 1175, questioned on another point in *Verdin v. Superior Court* (2008) 43 Cal.4th 1096, 1106.) The court's ruling on a motion to discharge the venire will be reversed only upon a clear showing of an abuse of discretion. (*Martinez, supra*, 228 Cal.App.3d at pp. 1466–1467.)

A trial court also has wide discretion in deciding what questions should be asked on voir dire to determine potential jurors' biases, and it abuses that discretion " 'if its failure to ask questions renders the defendant's trial " 'fundamentally unfair' " or " ' "if the questioning is not reasonably sufficient to test the jury for bias or partiality." ' " ' [Citations.]" (*People v. Harris* (2013) 57 Cal.4th 804, 831.)

B. Motions to Dismiss the Venire

A series of cases has addressed defense motions to discharge entire venires. In *Medina, supra*, 51 Cal.3d 870, Prospective juror S. said during voir dire in a capital case that she heard some prospective jurors "make statements such as 'even his own lawyers think he's guilty,' and 'they ought to have [*sic*] him and get it over with.' " (*Id.* at p. 888.) At the defendant's request, the court held a hearing on the matter, where Prospective Juror S. said that at least five prospective jurors had made such remarks and identified them. Prospective juror D. confirmed that he and a few other venirepersons were in the court elevator, and they made statements "such as 'in frontier justice style,' the authorities should 'bring the guilty S.O.B. in, we'll give him a trial, and then hang him.' " (*Ibid.*) Another prospective juror had heard similar comments. (*Ibid.*) The defendant moved to discharge the entire venire and argued that it had become tainted and further inquiry would only aggravate the situation. The trial court denied the motion

without prejudice to a renewed motion following further voir dire. The defendant declined to conduct such voir dire and asserted it would be impossible to further explore juror bias without antagonizing the jurors and creating added bias against the defendant. (*Id*. at pp. 888–889.)

Medina held the defendant's motion to discharge the venire was properly denied: "[N]one of the prospective jurors implicated during the bias hearing actually served on defendant's jury, and each person selected for the jury affirmed his or her ability to be fair and impartial. Moreover, the People note that defendant failed to exhaust his peremptory challenges and, accordingly, cannot complain of any error in failing to exclude particular jurors. [Citation.] We question the application of the foregoing rule to situations in which the defendant complains of a failure to discharge an entire venire, for we could not expect the defendant to expend his peremptory challenges in a vain attempt to exclude every member of the venire. But, for other reasons, we think the People's basic position has merit." (*Medina*, *supra*, 51 Cal.3d at p. 889.)

> "We believe the trial court possesses broad discretion to determine whether or not possible bias or prejudice against the defendant has contaminated the entire venire to such an extreme that its discharge is required. Defendant cites no case, and we have found none, indicating that such a drastic remedy is appropriate as a matter of course merely because a few prospective jurors have made inflammatory remarks. Unquestionably, further investigation and more probing voir dire examination may be called for in such situations, but discharging the entire venire is a remedy that should be reserved for the most serious occasions of demonstrated bias or prejudice, where interrogation and removal of the offending venirepersons would be insufficient protection for the defendant. The present case falls short of that mark. We conclude the trial court did not err in declining to discharge the entire venire." (*Id*. at p. 889.)

In *People v. Cleveland* (2004) 32 Cal.4th 704 (*Cleveland*), a prospective juror in a capital case "was a retired law enforcement officer with substantial experience in homicide cases who had testified in court over a thousand times," and said during voir dire that "the death penalty was 'too seldom [used] due to legal obstructions,' " and said

he would be " 'unfair to the defense based on his knowledge of how these trials are conducted.' " The court excused him for cause. The defendant did not move to dismiss the venire or admonish the panel. (*Id*. at p. 735.)

Cleveland held the defendant's argument that the prospective juror's statements tainted the entire venire was not cognizable on appeal since he had not moved to dismiss the venire. *Cleveland* also found no error: "Many prospective jurors express many different general opinions regarding the judicial system. These expressions of opinion do not taint the jury. The comments here did not give the other prospective jurors information specific to the case, but just exposed them to one person's opinion about the judicial system. [Citation.] The circumstance that this particular opinion came from a retired peace officer with experience in homicide cases and trial proceedings does not change matters. It would no more prejudice a jury panel to hear that a retired (or active) peace officer believes the system is tilted in favor of defendants than to hear a criminal defense attorney express the opposite view." (*Cleveland*, *supra*, 32 Cal.4th at p. 736.)

In *People v. Nguyen* (1994) 23 Cal.App.4th 32 (*Nguyen*), the court advised the prospective jurors that the defendants and many of the witnesses were Vietnamese, and the media had been highlighting robberies in the Vietnamese community. The court asked if any of the prospective jurors held biases against Vietnamese people. A prospective juror said he was Vietnamese and mentioned retaliation. The court asked if he feared retribution or retaliation if he sat on the jury. The prospective juror said that he did not know; he might feel discomfort sitting on the jury, but he felt he could render an impartial verdict. The defendant used a peremptory challenge to excuse him, and then moved to discharge the entire venire and argued the court's questions were inflammatory and prejudice the entire panel. The court denied the motion. (*Id.* at pp. 40–42.)

Nguyen held the court did not abuse its discretion to deny defendant's motion to discharge the venire. The prospective juror's statements "did not contain any information which suggests the entire panel would have been prejudiced against [the defendant].

Unlike [the defendant], we do not view [the prospective juror's] comments as being particularly 'inflammatory.' [The prospective juror] stated that he might fear retaliation since he belonged to the Vietnamese community but he nonetheless informed the court that he could be fair…." (*Nguyen*, *supra*, 23 Cal.App.4th at p. 41.) *Nguyen* noted that the prospective juror was excused, and his statements would not have affected the rest of the jury panel. (*Id.* at p. 42.)

In *Martinez*, *supra*, 228 Cal.App.3d 1456, the defendant argued that prospective jurors made various statements that "tainted the entire jury panel because they were inflammatory, hostile and biased against him and the criminal justice system." (*Id.* at p. 1459.) The statements reflected that prospective jurors had "strong opinions about persons charged with crimes, about the criminal justice system, about defendants who do not speak English, and about police officers." (*Id.* at p. 1461.) The defendant moved to excuse several people for cause. The court granted the motion to excuse all but one. Thereafter, the defendant moved to discharge the entire jury venire and argued the comments had been so inflammatory that no one who remained on the panel could be unbiased. The trial court denied the motion. (*Ibid.*)

Martinez held the court properly denied the motion. It first noted that the defendant could not complain that his attorney was not allowed to ask questions reasonably designed to discover potential prejudice to base a challenge for cause or a peremptory challenge. (*Martinez*, *supra*, 228 Cal.App.3d at p. 1464.) Many of the prospective jurors' " 'hostile comments' " were made in response to defense counsel's questioning, and counsel had "both the right and responsibility to probe a potential juror's mind in order to determine whether that juror can be fair and impartial. Sometimes counsel hits the proverbial pay dirt." (*Id.* at p. 1465.)

> "Defense counsel questioned the remaining jurors regarding the impact of the 'hostile comments.' The record does not reflect the remaining jurors were affected by the opinions expressed by those jurors who had been excused. Defense counsel also questioned the remaining

> jurors regarding their understanding of the presumption of innocence and the prosecution's burden of proving guilt beyond a reasonable doubt. The responses do not reflect a bias or prejudice against the defendant. [The defendant's] contention that actual prejudice resulted from the offensive comments assumes we should ignore or discount the answers given by the remaining jurors, i.e., we should presume the responses to counsel's questions were not candid or the jurors were subconsciously and irrevocably indoctrinated by the views expressed. We decline to engage in such speculation." (*Id*. at p. 1465.)

Martinez further noted that "the trial judge did not sit idly by in the face of the opinions expressed" and responded by admonishing the prospective jurors about the presumption of innocence and the People's burden of proof. (*Martinez*, *supra*, 228 Cal.App.3d at p. 1466.) While the court could have been "more vocal," *Martinez* found defense counsel questioning the remaining jurors and "explained their proper role in the process." (*Ibid*.) *Martinez* concluded that "[t]o the extent the remaining jurors may have found some merit in the comments, it does not appear they were unable to set aside their frustration with the system in order to judge the case against [the defendant] fairly and impartially." (*Ibid.*)

In *People v. Henderson* (1980) 107 Cal.App.3d 475, a prospective juror was excused for cause "after she revealed that the victim had been her client in psychotherapy 'this year.' " (*Id.* at p. 493.) The defendant's motion to discharge the entire venire was denied. *Henderson* held the trial court did not abuse its discretion to "conclude the prospective juror's statement was nonprejudicial and to refuse to dismiss the entire jury panel. [Citation.]" (*Ibid*.; *People v. Vernon* (1979) 89 Cal.App.3d 853, 865 [prospective juror's statement during voir dire that defendant had been tried for raping her niece was not unduly prejudicial].)

C. Analysis

Defendant contends the court abused its discretion when it denied his motions during voir dire to dismiss the venire and for a mistrial. Defendant asserts that Juror No. 4004948's statements made it impossible to select a fair and impartial jury.

Defendant argues the statements were intrinsically prejudicial because the juror revealed the fact that defendant had been in prison, rather than simply stating an inappropriate opinion in response to questions during voir dire. (ARB 6-7)

In making this argument, defendant asserts the court improperly blamed him for the entire incident because he might have acknowledged Juror No. 4004948 during voir dire. Defendant argues that even if he did so, he did not forfeit his constitutional rights to due process and a fair and impartial jury since the venire was tainted by the knowledge that he had been to prison.

As set forth above, the court made lengthy findings about this incident and stated that it watched defendant make "a furtive motion" toward Juror No. 4004948, after which the juror acknowledged defendant and said he looked familiar. To the extent that defendant may have triggered the entire incident by gesturing at Juror No. 4004948, "a defendant may not be heard to complain when … such prejudice as he may have suffered resulted from his own voluntary act. [Citation.]" (*People v. Hendricks* (1988) 44 Cal.3d 635, 643.)

Given the court's description of the incident, it would have been preferable if defendant had quietly informed his attorney the juror had been one of his prison guards instead of waving to him. Defense counsel could have approached the bench and explained the need for an immediate recess, and the entire situation would have been addressed outside the venire's presence.

While the court was understandably frustrated by defendant's actions, it still addressed the merits of defense counsel's motion to dismiss the venire and the possible impact from Juror No. 4004948's statements. As explained in *Medina*, the discharge of an entire venire "should be reserved for the most serious occasions of demonstrated bias and prejudice, where interrogation and removal of the offending venirepersons would be insufficient protection for the defendant." (*Medina, supra,* 51 Cal.3d at p. 889.) Juror No. 4004948's initial statements – that defendant had been to Wasco and served as a

porter – were certainly not as serious as the statements addressed in *Medina* and *Nguyen*. Juror No. 4004948 did not express any animus, bias, or blanket belief of defendant's guilt in his initial statement, or in response to the attorneys' subsequent questions when voir dire resumed. He affirmed that he would follow the court's instructions and require the People to prove defendant's guilt beyond a reasonable doubt. During the private questioning, Juror No. 4004948 spoke favorably about defendant as a good porter and, when asked if there were any negative details about defendant, said there were not. Indeed, the juror's favorable statements about defendant might have been the reason why defense counsel did not challenge him for cause or use a peremptory challenge to excuse him, even though counsel acknowledged after voir dire that he still had peremptory challenges left.

The court "did not sit idly by" in the face of Juror No. 4004948's statements (*Martinez, supra*, 228 Cal.App.3d at p. 1466) and clearly realized that "further examination and more probing voir dire examination" was required (*Medina, supra*, 51 Cal.3d at p. 889). The court directed the parties to continue voir dire and did not place any time or topic restrictions on the questions asked by either defense counsel or the prosecutor. They extensively questioned the prospective jurors who had been in the courtroom about their reactions to the information that defendant had been in prison, and some individuals were questioned in private.

Defendant argues the entire panel was tainted after hearing the "inherently prejudicial" information that defendant had been in prison, and it was "impossible" to select a fair and impartial jury. As voir dire continued, it was apparent that many in the venire had not been influenced by hearing Juror No. 4004948's information that defendant had previously been at Wasco. While some prospective jurors admitted bias as a result of hearing that information, those individuals were either excused for cause or removed through defense counsel's peremptory challenges. Defense counsel did not

complain that there were additional individuals he wanted to excuse and conceded that he had peremptory challenges left after the jury was sworn.

The court later noted that, as a result of the continued voir dire, it was confident that "the jurors that were empaneled could give both sides a fair trial," and understood that the admission of his prior offenses could only be considered for impeachment of his credibility.

The record supports the court's findings that the individuals who were ultimately seated on the jury were not "affected by the opinions expressed by those jurors who had been excused," and their responses did not indicate "bias or prejudice against the defendant." (*Martinez, supra,* 228 Cal.App.3d at p. 1465.) "[The defendant's] contention that actual prejudice resulted from the offensive comments assumes we should ignore or discount the answers given by the remaining jurors, i.e., we should presume the responses to counsel's questions were not candid or the jurors were subconsciously and irrevocably indoctrinated by the views expressed. We decline to engage in such speculation." (*Ibid.*)

Defendant notes that during trial, the jurors heard defendant's testimony that he had prior criminal convictions but based on Juror No. 4004948's statements, "evidence of state prison custody is qualitatively different. It allowed the jury to infer that [defendant] was very likely a serious offender whose crimes had been deserving of prison time." The entirety of the record refutes this argument. The court addressed the admission of defendant's prior convictions for impeachment prior to jury selection. The court initially advised the prosecutor to sanitize the prior convictions, so the jury would not hear that those offenses were similar to the charged counts. On further consideration, the court granted defense counsel's request and instructed the prosecutor to refer to defendant's prior convictions as theft-related offenses. When defendant testified, he admitted that he had prior convictions for petty theft with a prior conviction and attempted second degree

commercial burglary. Thus, the jury was not left to speculate that defendant's record was for more serious or violent offenses.

Defendant acknowledges the holdings in *Medina* and *Martinez*, but relies on *Mach v. Stewart* (9th Cir. 1998) 137 F.3d 630 (*Mach*) in support of his argument that the venire was impermissibly tainted and should have been dismissed. In *Mach*, the defendant was tried for child sexual abuse. During voir dire, a prospective juror, who was a social worker with state's child protective services, said repeatedly "that she had never, in three years in her position, become aware of a case in which a child had lied about being sexually assaulted." (*Id.* at p. 632.) "The court asked the other jurors whether anyone disagreed with her statement, and no one responded." (*Id.* at p. 633.)

Mach agreed with the defendant's argument that the prospective juror's statement "impermissibly tainted the jury pool to the extent that the court should have granted a mistrial." (*Mach, supra*, 137 F.3d at p. 632.) "At a minimum, when [the defendant] moved for a mistrial, the court should have conducted further voir dire to determine whether the panel had in fact been infected by [the prospective juror's] expert-like statements. Given the nature of [the prospective juror's] statements, the certainty with which they were delivered, the years of experience that led to them, and the number of times that they were repeated, we presume that at least one juror was tainted and entered into jury deliberations with the conviction that children simply never lie about being sexually abused. This bias violated [the defendant's] right to an impartial jury." (*Id.* at p. 633, fn. omitted.)

Defendant argues that this court should follow *Mach's* presumption of prejudice. However, we are not bound "by decisions of the lower federal courts, even on federal questions. [Citatoins.]" (*People v. Crittenden* (1994) 9 Cal.4th 83, 120, fn. 3.) While *Mach* presumed prejudice based on the prospective juror's statements that were made in the venire's presence (*Mach, supra*, 137 F.3d at p. 633), California law does not indulge in a presumption of jury taint or prejudice arising in such a situation. (*Medina, supra*, 51

Cal.3d at p. 889.) Instead, the California Supreme Court has repeatedly held that it is within the trial court's "broad discretion to determine whether or not possible bias or prejudice against the defendant has contaminated the entire venire to such an extreme that its discharge is required." (*Ibid*.) On appeal, we "defer to the trial court's determination of the states of mind of [prospective] jurors in the face of conflicting or equivocal answers to questions concerning impartiality. [Citations.]" (*People v. Morris* (1991) 53 Cal.3d 152, 186, fn. 4, disapproved on another point in *People v. Stansbury* (1995) 9 Cal.4th 824, 830, fn. 1.) We are bound to follow these principles enunciated by our state's high court. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

In addition, *Mach* is factually distinguishable from this case. The prospective juror's statements in *Mach* were effectively assurances about the credibility of the child witness, given by someone who claimed an expertise in determining the likelihood of a false report claim, that was "directly connected to [defendant's] guilt." (*Mach*, *supra*, 137 F.3d at p. 634.) There was silence when the court asked whether anyone on the panel disagreed with the juror's statement that "she had never known a child to lie about sexual abuse," (*id.* at p. 633), and the court declined to conduct additional voir dire to determine if the panel had been "infected" by the juror's "expert-like statements." (*Ibid*.) In contrast, Juror No. 4004948's statements about defendant were not directly connected to his guilt in this case, the attorneys extensively questioned each prospective juror about the impact of that information on his or her ability to be fair and impartial, and the individuals who displayed bias were removed either for cause or through peremptory challenges.

Finally, the jury was properly instructed on its duty to base its verdict solely on evidence presented during trial; the People's burden of proof; and its role to determine the credibility of witnesses. It also received CALCRIM No. 303:

> "When the defendant testified in this case, evidence was presented that he committed theft offenses in 1999, 2008 and 2013. You may consider that

evidence only in determining the defendant's credibility or believability. You cannot consider that evidence for any other purpose."

We presume the jury followed the court's instructions (*People v. Avila* (2006) 38 Cal.4th 491, 574), and the jury's verdict indicated that it did so and was not influenced by bias or prejudice against defendant because of his prior convictions. The information alleged that defendant personally used a deadly weapon, a knife, in the commission of the robberies in this case. Campos testified that she attempted to stop defendant with Datugan's help, defendant broke free from them, and he pulled out a pocket knife. Campos testified that defendant pointed the knife at them and tried to flick open the blade, and she ordered Datugan to step away because she believed he was going to hurt them with the knife. However, Datugan testified that she did not see a knife. Defendant testified that he tried to get away from them but insisted that he did not have a knife, and that he only pulled out the box with the stolen merchandise. The jury ultimately found the deadly weapon allegation not to be true.

We thus conclude that the court did not abuse its discretion when it denied defendant's motion to dismiss the venire and for a mistrial, and the entirety of the record shows that a fair and impartial jury was empaneled in this case.

II. Remand for Resentencing

Defendant contends, and the People agree, that defendant's sentence was erroneous. Defendant requests this court to correct his sentence while the People believe the matter must be remanded for resentencing.

We agree with the People that the matter must be remanded for resentencing. We will review the lengthy procedural record for assistance on remand.

A. The Prior Conviction Allegations

On February 24, 2015, an information was filed in the Superior Court of Kern County charging defendant with counts 1 and 2, robberies of Campos and Datagan (§ 212.5, subd. (c)), and that he personally used a deadly weapon, a knife, in the

commission of the offenses (§ 12022, subd. (b)(1); and count 3, misdemeanor resisting arrest (§ 148, subd. (a)(1)).

The information alleged several allegations based on defendant's prior convictions in Kern County. It alleged three prior serious felony enhancements (§ 667, subd. (a)) and three prior strike convictions (§ 667, subds. (b)–(i)), based on felonies that were from the same case: three convictions for violating section 460.1, in case No. SC39362 in 1989.

The information alleged defendant had six prior prison term enhancements (§ 667.5, subd. (b)) as follows:

1. Violation of section 460.1 in 1989, in case No. SC39362
2. Violation of section 496.1 in 1988, in case No. SC37128
3. Violation of section 666 in 1999, in case No. SC76904
4. Violation of section 666 in 2010, in case No. BF124956
5. Violation of sections 664/460(b) in 2013, in case No. BF142521
6. Violation of Health and Safety Code section 11350, subdivision (a) in 2014, in case No. BF150579B (CT 71-73, RT 594-595, 597, 603-604)

B. The Court's Dismissal of Two Prior Serious Felony Enhancements

On April 28, 2015, defendant filed a nonstatutory motion to dismiss two of the three prior serious felony enhancements alleged in the information, because the prior convictions were not brought and tried separately as required by section 667, subdivision (a). The People stated there was no basis to oppose this motion.

On May 12, 2015, the court granted defendant's motion and dismissed two of the three prior serious felony enhancements alleged in the information (§ 667, subd. (a)) because the prior convictions were not brought and tried separately.

C. The Court's Findings on the Prior Conviction Allegations

On April 14, 2016, defendant was convicted of both counts of robbery; the jury found the knife allegation not true.

On April 15, 2016, the court found the prior conviction allegations true, including the two prior serious felony enhancements that had already been dismissed prior to trial.

The court noted that some of the felony convictions underlying the prior prison term enhancements may have been reduced to misdemeanors under Proposition 47, and that it would not impose terms for those enhancements at the sentencing hearing.

D. Defendant's Motion to Dismiss; Reduction of Felonies to Misdemeanors

Thereafter, defendant filed a request to dismiss the prior strike convictions in the interests of justice. Defendant advised the court that some of the felony convictions underlying the prior prison term enhancements had been reduced to misdemeanors but did not submit any documentary exhibits to support that assertion.

The People filed opposition to defendant's request to dismiss.

The People also acknowledged that on May 13 and 21, 2015, four of defendant's prior felony convictions had been reduced to misdemeanors pursuant to Proposition 47 in case Nos. SC76904A, BF124954, BF142521, and BF150579. However, the People asserted that the prior prison term enhancements that were based on those convictions could still be imposed.

E. The First Sentencing Hearing

On June 30, 2016, the court conducted the sentencing hearing. It granted defendant's request to dismiss the three prior strike convictions pursuant to section 1385.

Defense counsel advised the court that defendant's prior attorney might have brought a motion to dismiss the prior serious felony enhancements, and that only one enhancement could be imposed since the three felony convictions were based on the same case. Counsel also advised the court that the felony convictions for the prior prison term enhancements may have been reduced to misdemeanors.

The court found that all three prior serious felony enhancements (§ 667, subd. (a)) could be imposed even though they were from the same case, and it did not have

discretion to stay any of those enhancements. The court found that one of the six prior felony convictions was not a valid basis for a prior prison term enhancement (§ 667.5, subd. (b)), and there were only five valid prior prison term enhancements.

The court sentenced defendant to 21 years, based on the upper term of five years on count 1, robbery; a consecutive term of one year on count 2, robbery (one-third the midterm of three years); three consecutive five-year terms for the three prior serious felony enhancements (§ 667, subd. (a)); and a concurrent term of 180 days in jail for count 3, resisting arrest.

The court ordered the five prior prison term enhancements stricken (§ 667.5, subd. (b)). It did not make any findings as to whether the underlying felony convictions had been reduced to misdemeanors.

On June 30, 2016, defendant filed a timely notice of appeal.

F. The People's Motion to Recall

On July 7, 2016, the People filed a motion in superior court to recall and modify defendant's sentence. The motion explained the convictions underlying the three prior serious felony enhancements (§ 667, subd. (a)) were not brought and tried separately. The court erroneously imposed terms for all three enhancements and defendant's sentence was unlawful. The People requested the court reconsider whether to dismiss the prior strike convictions when it resentenced defendant.

G. The Resentencing Hearing

On August 3, 2016, the court conducted a hearing and granted the People's motion to recall defendant's sentence. The court acknowledged that defendant's prior sentence was unlawful because the convictions underlying the three prior serious felony enhancements had not been brought and tried separately, as required by section 667, subdivision (a). The prosecutor requested the court reconsider whether to dismiss any of the prior strike convictions.

The court found that the aggregate sentence of 21 years was still appropriate. It dismissed two of the three prior strike convictions; acknowledged that it could not impose terms for two of the prior serious felony enhancements and dismissed one of the prior prison term enhancements. The court did not address whether any of the underlying felony convictions had been reduced to misdemeanors.

The court again sentenced defendant to 21 years based on the upper term of five years for count 1, robbery, doubled to 10 years as the second strike term; a consecutive term of two years for count 2, robbery;[5] a consecutive term of five years for one prior serious felony enhancement (§ 667, subd. (a)); four consecutive one-year terms for the four remaining prior prison term enhancements (§ 667.5, subd. (b)); and a concurrent term of 180 days on count 3, resisting arrest.

On August 4, 2016, defendant filed a timely notice of appeal.

H. Analysis

Defendant contends the matter must be remanded for another sentencing hearing, and argues the court erroneously imposed prior prison term enhancements based on felony convictions that had been reduced to misdemeanors. Defendant cited the People's opposition to his request to dismiss, that stated the felonies had been reduced pursuant to Proposition 47 in May 2015, prior to the sentencing hearing in this case. Defendant argued the imposition of the prior prison term enhancements resulted in an unlawful sentence and requests this court to modify his sentence.

The People agree that this case must be remanded for resentencing, and for the court to determine whether any of defendant's felony convictions that were the basis for the prior prison term enhancements (section 667.5, subd. (b)) have been reduced to misdemeanors pursuant to Proposition 47.

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[5] The court erroneously stated that the two-year term for count 2 was one-third the midterm; the correct term should have been one year.

The People also note that at the resentencing hearing, the court imposed a consecutive term of two years for count 2, robbery and stated that it represented one-third the midterm. However, the correct sentence should have been one year, as one-third the midterm of three years.

We agree that the matter must be remanded for the court to correct the sentence for count 2 and determine whether any of defendant's felony convictions were reduced to misdemeanors. (See *People v. Buycks* (2018) 5 Cal.5th 857.)

We decline defendant's request to modify his sentence on appeal. Prior to the first sentencing hearing, the parties apparently agreed that some of defendant's prior felony convictions had already been reduced to misdemeanors. However, neither defendant nor the People introduced any documentary exhibits to support that assertion. Upon remand, the parties must file the appropriate motions supported by documentary exhibits for the superior court to determine whether the prior felony convictions have been reduced to misdemeanors, and if defendant must be resentenced on the enhancements.

III. <u>The Prior Serious Felony Enhancement</u>

As explained above, the court ultimately sentenced defendant to 21 years based on the upper term of five years for count 1, robbery, doubled to 10 years as the second strike term; a consecutive term of two years for count 2, robbery; a consecutive term of five years for one prior serious felony enhancement (§ 667, subd. (a)); four consecutive one-year terms for the four remaining prior prison term enhancements (§ 667.5, subd. (b)); and a concurrent term of 180 days on count 3, resisting arrest.

At the time of the sentencing hearing, the court was statutorily required to impose the section 667, subdivision (a) enhancement and did not have any authority to strike or dismiss it. (§ 667, former subd. (a)(1); § 1385, former subd. (b).)

As we have also explained, the matter must be remanded for resentencing.

Defendant argues that on remand, the court must also consider whether to dismiss the section 667, subdivision (a) prior serious felony enhancement in furtherance of

justice, pursuant to the recent amendments to section 667 and section 1385 enacted by Senate Bill No. 1393, effective January 1, 2019, which removed the prohibitions on striking a prior serious felony enhancement. (See Stats. 2018, ch. 1013, §§ 1–2.)

The People concede the amendments apply since defendant's case is not yet final, and the superior court should address this issue since the matter is already being remanded.

Therefore, on remand, the court shall consider whether to strike the prior serious felony enhancement in furtherance of justice. We do not find that the court must strike the enhancement, but only that the court must consider whether to exercise its discretion pursuant to the newly-enacted statutory provisions.

DISPOSITION

The matter is remanded for a new sentencing hearing as set forth in the opinion. In all other respects, the judgment is affirmed.

_____
POOCHIGIAN, Acting P.J.

WE CONCUR:

_____
FRANSON, J.

_____
MEEHAN, J.